

STATE WATER CONTROL BOARD ENFORCEMENT ACTION

SPECIAL ORDER BY CONSENT WITH TERRY / PETERSON DEVELOPMENT ONE, L.L.C. TERRY / PETERSON RESIDENTIAL TEN, L.L.C. Permit No. VAR450770

SECTION A: Purpose

This is a Consent Special Order issued under the authority of §62.1-44.15(8a) and §62.1-44.15(8d) of the Code of Virginia, between the State Water Control Board and Terry Peterson Residential Companies for the purpose of resolving certain violations of environmental law and regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. “Code” means the Code of Virginia (1950), as amended.
2. “Board” means the State Water Control Board, a permanent citizens’ board of the Commonwealth of Virginia as described in the Code §§ 10.1-1184 and 62.1-44.7.
3. “Department” or “DEQ” means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in the Code § 10.1-1183.
4. “Director” means the Director of the Department of Environmental Quality.
5. “Order” means this document, also known as a Consent Special Order.
6. “TPRC” means Terry / Peterson Development One, L.L.C. and Terry / Peterson Residential Ten, L.L.C., certified to do business in Virginia and its affiliates, partners, subsidiaries, and parents.
7. “TRO” means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia.
8. “Regulations” means 9 VAC 25-31-10 *et seq.* - Virginia Pollutant Discharge Elimination System (VPDES) Permit Regulation.

9. VPDES General Permit Regulations" means 9 VAC 25-180-10 *et seq.* – Virginia Pollutant Discharge Elimination System General Permit Regulations for Discharges of Storm Water from Construction Activities.
10. "Permit" means General VPDES Permit No. VAR450770.

SECTION C: Findings of Fact and Conclusions of Law

1. On May 13, 2002, DEQ received a complete registration statement from TPRC for a VPDES storm water general permit associated with construction activity on Tracts 5, 6, and 7 of the Eagle Harbor residential/commercial development located in Isle Of Wight County, Virginia. Coverage under the Permit became effective May 14, 2002 and will expire June 30, 2004. TPRC owns Tracts 5, 6, and 7 encompassing approximately 115 acres with approximately 50 total disturbed acres. The activity covered by the Permit consists of the construction of more than 150 housing units.
2. Section 62.1-44.5.A of the Code and §9 VAC 25-31-50.A. of the Regulations state: "Except in compliance with a permit...issued by the Board, it shall be unlawful for any person to discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances."
3. Section 62.1-44.5.B of the Code and §9 VAC 25-31-50.B of the Regulations state any person/permittee "who discharges or causes or allows a discharge of...wastes...into or upon state waters... shall notify the Department of the discharge immediately upon discovery of the discharge, but in no case later than 24 hours after said discovery."
4. Part II.A of the Permit requires TPRC to develop a storm water pollution prevention plan (SWP3) prior to the submittal of a registration statement and to implement and provide for compliance with the terms and schedule of the plan beginning with the initiation of construction activities. TPRC's registration statement stated their Erosion and Sediment (E&S) Control Plan, as required by local ordinance, would serve as the SWP3. Under Part II of the Permit, the E&S Plan can serve as the SWP3 provided it meets or exceeds the SWP3 requirements of Part II.D of the Permit. As is noted below, the E&S Control Plan did not meet the requirements of Part II.D of the Permit.
5. Part III.L of the Permit states: "The permittee shall comply with all conditions of this permit."
6. On December 12, 2002, a Department of Conservation and Recreation inspector, and on February 24 and 28, 2003 and March 6, 2003 Staff observed a total of nine unauthorized discharges of sediment laden water from Tracts 5 and 7 to Ragged Island Creek and adjacent wetlands. Eight of these unauthorized discharges were not reported to DEQ. These discharges were unauthorized in that they occurred during a time that TPRC was conducting construction activities at the site without a sufficient SWP3 (as is noted below), in violation of the conditions of Part II of the Permit (9 VAC 25-180-70). The VPDES General Permit Regulations, at Section 9 VAC 25-180-50.A, state that discharges from construction sites are authorized only upon the condition that the regulated party complies with the requirements of 9 VAC 25-180-70.

7. On December 17, 2002, Staff reviewed the E&S Control Plan and found the following SWP3 components had not been implemented and/or included in the SWP3:
 - a. Part II.D.2a (1)(b) of the Permit requires TPRC to install and maintain erosion and sediment controls. On December 17, 2002, February 24 and 28, 2003, and March 6, 2003, Staff observed that E&S controls were not installed and/or maintained; and/or stockpiles were not correctly maintained, stabilized, and /or protected with sediment trapping devices; and/or storm water inlet and outlet protection was not implemented and maintained prior to and during construction activity. The temporary best management pond (BMP) and sediment trap on Tract 5 had not been installed before the first phase of construction as required by the E&S plan. The construction of the temporary BMP pond did not start until March 7, 2003.
 - b. Part II.D.2a. (1)(c) of the Permit requires the removal of offsite sediment accumulations to minimize offsite impacts. On December 17, 2002, February 24, 2003, and February 28, 2003, Staff observed accumulations of sediment within the riparian buffer area on Tracts 5 and 7. Some attempt was made to remove the sediment.
 - c. Part II.D.2a (2) of the Permit requires TPRC to maintain a record of dates when major grading activities occur, when construction activities temporarily or permanently cease on a portion of the site, and when stabilization measures are initiated. The record is to be maintained and included in the SWP3. Staff's review of TPRC's records revealed that documentation of major grading activities was incomplete because the records only indicated the dates when construction activities and stabilization measures commenced.
 - d. Part II.E of the Permit requires that all contractors and subcontractors be identified in the SWP3 and that they must sign a certification prior to performing any professional service at the site identified in the SWP3. According to TPRC's records, construction activity started on October 22, 2002 and December 16, 2002 on Tracts 5 and 7, respectively. The required contractor certification was not signed until April 18, 2003.
 - e. During subsequent site visits, Staff observed that these violations have been corrected.
8. On April 9, 2003, DEQ issued TPRC Notice of Violation No. W2003-04-T-0002 for the above mentioned violations.
9. DEQ observed during the February 28, 2003 and March 6, 2003 inspection that TPRC installed additional E&S controls that were not listed on the approved E&S control plan. On October 1, 2003, The National Weather Service in Wakefield, VA published a report stating, "The period from January to September 2003 (49.16 inches) was the 3rd wettest in the past 100 years and the 6th wettest of all time for the Norfolk area."

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority granted it in VA Code § 62.1-44.15(8a) and (8d), orders TPRC, and TPRC agrees, to the following:

1. Voluntarily pay a civil charge of \$14, 240 within 30 days of the effective date of the Order in settlement of the violations cited in this Order. The payment shall include the TPRC's Federal Identification Number and shall note on its face that the payment is being made in accordance with the requirements of this Order. Payment shall be made by check, certified check, money order, or cashier's check payable to the "Treasurer, Commonwealth of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 10150
Richmond, Virginia 23240.

2. Comply with all the requirements of the Permit.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of TPRC, for good cause shown by TPRC, or on its own motion after notice and opportunity to be heard.
2. This Order only addresses and resolves those violations specifically identified herein, including those matters addressed in the Notice of Violation issued to TPRC by DEQ on April 9, 2003. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility as may be authorized by law; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.
3. For purposes of this Order and subsequent actions with respect to this Order, TPRC admits the jurisdictional allegations, but does not admit the factual findings, and conclusions of law contained herein.
4. TPRC consents to venue in the Circuit Court of the City of Virginia Beach for any civil action taken to enforce the terms of this Order.
5. TPRC declares it has received fair and due process under the Administrative Process Act, Va. Code §§2.2 - 4000 *et seq.*, and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.

6. Failure by TPRC to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. TPRC shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. TPRC shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. TPRC shall notify the DEQ Regional Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
 - a. the reasons for the delay or noncompliance;
 - b. the projected duration of any such delay or noncompliance;
 - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
 - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director within 24 hours of learning of any condition above, which TPRC intends to assert, will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto; their successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and TPRC. Notwithstanding the foregoing, TPRC agrees to be bound by any compliance date, which precedes the effective date of this Order.
11. This Order shall continue in effect until TPRC petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order. In addition, the Director or the Board may terminate this Order, for good cause upon 30 days' written notice to TPRC. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve TPRC from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.
12. By its signature below, TPRC voluntarily agrees to the issuance of this Order.

And it is so ORDERED this day of _____, 2004.

Francis L. Daniel, Tidewater Regional Office for
Robert G. Burnley, Director
Department of Environmental Quality

TPRC voluntarily agrees to the issuance of this Order.

By: _____

Date: _____

Commonwealth of Virginia

City/County of Isle of Wight, VA

The foregoing document was signed and acknowledged before me this ____ day of
_____, 2004, by _____, who is

_____ of TPRC, on behalf of the Corporation.

Notary Public

My commission expires: _____.